



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

July 17, 2001

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2001-09

Robert F. Bauer  
Brian G. Svoboda  
Perkins Coie LLP  
607 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20005-2011

Dear Mr. Bauer:

This responds to your letter dated June 4, 2001, on behalf of Kerrey for U.S. Senate ("the Committee"), the principal campaign committee of former United States Senator J. Robert Kerrey, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the use of campaign funds for the payment of media consulting expenses incurred as a result of media inquiries pertaining to Senator Kerrey's activity during the Vietnam War.

***Factual Background***

Senator Kerrey was elected to the U.S. Senate from Nebraska in 1988 and re-elected in 1994. The Committee served as his principal campaign committee in both elections. He was also a candidate for the Democratic Presidential nomination in 1992. He established a separate committee for that election, which has since terminated with the Commission.

Senator Kerrey was frequently mentioned as a potential candidate for President in 2000. However, in December 1998, he announced that he would not seek that office and would run for a third term for the Senate instead. The Committee raised and spent funds for a possible 2000 re-election campaign. However, on January 20, 2000, Senator Kerrey announced that he would not be a candidate for re-election. He left the Senate on

January 3, 2001, and now serves as President of the New School University in New York City. He is not a candidate for any public office. The Committee remains registered with the Commission, disclosing \$1,176,586 cash-on-hand on its 2000 Year-End Report.<sup>1</sup>

You state that each of Senator Kerrey's campaigns for Federal office has involved public discussion of his service in a United States Navy Sea, Air and Land (SEAL) team during the Vietnam War. In 1998, while Senator Kerrey was still presumed to be a candidate for Senate under Commission regulations, Greg Vistica, a *Newsweek* reporter, began an inquiry related to his Vietnam service.

The subject of the inquiry was the nature of Mr. Kerrey's involvement in a February 1969 SEAL operation in the village of Thanh Phong that resulted in the deaths of Vietnamese civilians. The reporter interviewed Mr. Kerrey about the operation in late 1998, and, after Mr. Kerrey announced in December 1998 that he would not seek the Presidency in 2000, *Newsweek* declined to publish Mr. Vistica's story. You note that subsequent comments by the magazine's assistant managing editor, Evan Thomas (reported in April 2001), made clear that publication had been contingent on Senator Kerrey's political plans; specifically, that the story would not be published if he was not a presidential candidate in 2000. After Mr. Vistica left *Newsweek*, he continued to work on the story throughout the remainder of Mr. Kerrey's Senate term. He interviewed Mr. Kerrey several more times for the story, which ultimately became a joint project of *The New York Times Magazine* and CBS News.

In April 2001, with publication of the story imminent, former Senator Kerrey publicly discussed the Thanh Phong incident for the first time in a speech at the Virginia Military Institute. This triggered a series of news stories disclosing the incident. *The New York Times* then published Vistica's story on its web site on April 25, and in *The New York Times Magazine* on April 29. CBS broadcast an hour-long television version of the story on May 1, on the program *60 Minutes II*.

The *New York Times Magazine* story prompted substantial media attention. You assert that much of this attention focused not on Mr. Kerrey's conduct as a Navy lieutenant in 1969, but rather on the manner in which he discussed his war record as a Federal candidate and officeholder. You cite, for example, a number of statements by reporters or writers with CNN, Fox News, and *The New York Times* commenting on his failure to mention the incident, e.g., that he had received a Bronze Star in connection with the 1969 operation, but had never disclosed the medal on his Senate office web site; that he never renounced the Bronze Star; that he never mentioned the episode over the years, and he did not want anyone to know about it while he was a Senator. You also state that much of the questioning of Mr. Kerrey at a news conference he held on April 26 (after the web publication of the *New York Times Magazine* article), focused on the fact that he had not discussed the incident when he was a Federal candidate and public official.

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<sup>1</sup> You state that the Committee has timely refunded contributions received for the 2000 general election and funds received after Senator Kerrey's withdrawal from the Senate race.

For advice in dealing with the media attention that had resulted from the late April story, Mr. Kerrey retained the public relations firm of Westhill Partners. The firm helped Mr. Kerrey manage the media response to the *New York Times Magazine* story, the *60 Minutes II* broadcast, and the accompanying press coverage. The firm responded to media inquiries on his behalf and advised him on his own communications with media outlets regarding the story. On May 17, Westhill Partners sent Mr. Kerrey an invoice for \$59,554.48, reflecting the firm's charge for the aforementioned services. The invoice remains unpaid.

You maintain that the media attention to Mr. Kerrey's activities at Thanh Phong, and hence his expenses in responding to such attention, would never have arisen if it were not for the fact that he was a Federal candidate and Federal officeholder. You also assert that much of the media attention was focused on his conduct as a Federal candidate and officeholder in failing to disclose the Thanh Phong incident and thus the expenses would not have arisen but for his candidate and officeholder status. You assert therefore that Mr. Kerrey may thus use Committee funds to pay the invoiced amount because such disbursements would not be prohibited as a personal use of campaign funds. (You note that no relative or family member of Mr. Kerrey is associated in any way with Westhill Partners.) You ask the Commission to approve such a payment.

### ***Analysis***

Under the Act and Commission regulations, a candidate and the candidate's committee may use excess campaign funds "for any . . . lawful purpose," but may not convert such funds to the personal use of the candidate or any other person. 2 U.S.C. 439a; 11 CFR 113.2(d).

Commission regulations provide guidance regarding what is considered personal use of campaign funds. Personal use is defined as "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR 113.1(g). Commission regulations list a number of purposes that would constitute personal use *per se*. 11 CFR 113.1(g)(1)(i). These purposes do not include public relations expenses to respond to media inquiries. Where a specific use is not listed as personal use, the Commission makes a determination, on a case-by-case basis, whether an expense would fall within the definition of personal use at 11 CFR 113.1(g). 11 CFR 113.1(g)(1)(ii). This list specifically includes legal fees, and meal, travel, and vehicle expenses, but also provides for the application of the "irrespective" test to expenses that are not listed.

The Commission explained the meaning of the "irrespective test" in its Explanation and Justification of the regulations on personal use, which it promulgated in early 1995. See Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 *Fed. Reg.* 7862 (February 9, 1995). The Commission stated:

If campaign funds are used for a financial obligation that is caused by campaign activity or the activities of an officeholder, that use is not personal use. However, if the obligation would exist even in the absence of the candidacy or even if the officeholder were not in office, then the use of funds for that obligation generally would be personal use.

60 *Fed. Reg.* at 7863-4. Moreover, in explaining the case-by-case approach, the Commission stated that it:

reaffirms its long-standing opinion that candidates have wide discretion over the use of campaign funds. If the candidate can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use.

60 *Fed. Reg.* at 7867.

The Commission concludes that the media would not have focused on Senator Kerrey's activities if he had not been a candidate and strong contender for the Democratic presidential nomination in 1992, a prominent United States Senator, and a potential candidate in 2000 for the Senate or the presidency. The Commission views two factors as demonstrating a direct resultant relationship to his campaigns and officeholder activities.

The most significant factor demonstrating the relationship to Senator Kerrey's candidacy or officeholder activities is the fact that the media inquiry into the Thanh Phong incident began when Senator Kerrey was still in the Senate, was a Senate candidate under Commission rules, and was generally viewed as a probable presidential candidate for the 2000 primary election. Although a *Newsweek* editor indicated that publication by the magazine was contingent on a presidential candidacy and the story was still pursued by Mr. Vistica after Mr. Kerrey announced that he would not seek the presidency in 2000, the editor's statement indicates that the original pursuit of the story was motivated by a desire to present important information about the fitness for Federal office of a Federal candidate and officeholder.

Also significant in assessing the nature of the media inquiries as directly related to Mr. Kerrey's Federal campaign and officeholder duties is the focus of some of the inquiries. Mr. Kerrey's service in Vietnam has been the subject of public discussion in each of his Federal campaigns. Questions and comments by the media as to why he never discussed the Thanh Phong incident when he ran for president or while he was a Senator indicate that his behavior as a candidate and Federal officeholder was an important cause of the media activity in April and May of 2001.

As indicated by the two factors above, the recent publicity would not have occurred if Mr. Kerrey had not been a prominent Senator and prominent Federal candidate, particularly one whose campaigns had entailed a discussion of his notable

Vietnam War record. Based on the foregoing analysis, Senator Kerrey may use Committee funds to pay the amount billed by Westhill Partners. The Commission notes that this is a unique situation and, as indicated above, this opinion's conclusion is based on the case-by-case determination provisions of 11 CFR 113.1(g)(1)(ii). This opinion does not establish any general rule regarding the use of campaign funds by former candidates or Federal officeholders for public relations expenses.

The Committee should report its payment to Westhill Partners under the category of "Other Disbursements." 2 U.S.C. §434(b)(4)(G) and (6)(A); 11 CFR 104.3(b)(2)(vi) and (b)(4)(vi). As part of its description of the purpose of the disbursement, the Committee should make reference to this opinion.

This response constitutes an advisory opinion concerning the application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. *See* 2 U.S.C. §437f.

Sincerely,

(signed)

Danny L. McDonald  
Chairman